Duquesne Law Review

Volume 22 | Number 3 Article 10

1984

Constitutional Law - Fourteenth Amendment - Right to Abortion - Regulatory Framework - Standard of Review

David B. Torrey

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—RIGHT TO ABORTION—REGULATORY FRAMEWORK—STANDARD OF REVIEW—The United State Supreme Court has held that the state may not, in its regulation of abortion, deviate from accepted medical practice, and that all pre-viability abortion regulation shall be subject to strict scrutiny under the compelling state interest standard of substantive due process analysis.

City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983).

The City Council of Akron, Ohio, in 1978 passed an ordinance designed to regulate the abortion procedure.[1] Three affected abortion clinics and a physician challenged the regulation, maintaining that its provisions were violative of the constitutional right to obtain an abortion.[2] The United States District Court for the Northern District of Ohio issued an injunction and invalidated three of the six provisions at issue.[3]

Declared unconstitutional were provisions requiring unmarried minors to obtain parental or guardian consent before an abortion,[4] mandating that the attending physician inform the patient of the

---

1. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983). *See* AKRON, OHIO, CODIFIED ORDINANCES ch. 1870 (1978). For the relevant portions of the ordinance, printed in their entirety, *see infra* notes 4-9.

2. 103 S. Ct. at 2490. In the landmark decision, Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court ruled that criminal abortion laws violated the due process clause of the fourteenth amendment, and established the abortion right as constitutional. For further discussion of the *Roe* decision, *see infra* notes 14-16 and accompanying text.

3. 103 S. Ct. at 2490. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1982). Plaintiffs challenged seven other provisions of the ordinance, but were unsuccessful, the court finding that the plaintiffs lacked standing with regard to those provisions. *Id.* at 1183-88.

4. 103 S. Ct. at 2490. The pertinent section of the notice and consent provision reads as follows:

> 1870.05 NOTICE AND CONSENT
>
> (B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and
>
> (1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or
>
> (2) The minor pregnant woman having first obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

AKRON, OHIO, CODIFIED ORDINANCES ch. 1870 § 1870.06 (1978).

medical status of her pregnancy and about abortion generally,[5] and ordering that the physician insure that fetal remains are disposed of in a humane and sanitary fashion.[6] Three provisions which were upheld were a requirement that all second trimester abortions be

---

5. 103 S. Ct. at 2489. The invalid part of the informed consent provision reads as follows:

1870.06 INFORMED CONSENT (B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05

(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infections, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870.06 (1978).

6. 103 S. Ct. at 2489. The fetal remains disposal provision reads as follows:

1870.16 DISPOSAL OF REMAINSAny physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in an humane and sanitary manner.

AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870, § 1870.16 (1978).

performed in hospitals,[7] a requirement that the physician inform the patient of the abortion process and its attendant risks,[8] and a provision requiring a twenty-four hour waiting period between consent to, and performance of, an abortion.[9]

Both sides appealed the ruling and the Court of Appeals for the Sixth Circuit reversed the district court's decision, declaring unconstitutional the requirements that the physician inform the patient of the abortion process and its attendant risks, and that there be a twenty-four hour waiting period, while affirming the lower court's ruling that the hospitalization requirement was valid.[10] Also affirmed was the district court's invalidation of the parental consent provision, the requirement that the physician inform the patient of the medical status of her pregnancy and about abortion generally, and the fetal remains disposal provision.[11] Both sides subsequently appealed the appeals court's ruling and certiorari was

---

7. 103 S. Ct. at 2489. The valid portion of the informed consent provision reads as follows:

1870.06 INFORMED CONSENT

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05

(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

AKRON, OHIO, CODIFIED ORDINANCE, ch. 1870, § 1870.06 (1978).

8. 103 S. Ct. at 2488. The in-hospital provision reads as follows:

1870.03 ABORTION IN HOSPITAL

No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.

AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870, § 1870.03 (1978).

9. 103 S. Ct. at 2489. The waiting period provision reads as follows:

1870.07 WAITING PERIOD

No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, have signed the consent form required by Section 1870.05 (B) of this Chapter, and the physician so certifies in writing that such time has elapsed.

AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870 § 1870.07 (1978).

10. City of Akron v. Akron Center for Reproductive Health, Inc., 651 F.2d 1198 (6th Cir. 1981).

11. *Id.*

granted.[12] In a six to three decision, the Supreme Court reversed the appeals court ruling that the hospitalization requirement was valid, while affirming the ruling that the other provisions were unconstitutional.[13]

Justice Powell, delivering the majority opinion,[14] first asserted that *stare decisis* required a reaffirmation of *Roe v. Wade*.[15] In that case, he explained, the Court held that the right to privacy founded in the fourteenth amendment's grant of personal liberty and restrictions on state action encompassed a woman's decision whether or not to terminate her pregnancy.[16]

While acknowledging that the abortion right established by *Roe* had to be considered in relation to state interests, Justice Powell pointed out that regulations stemming from those interests were subject to exacting judicial standards.[17] Thus, while a state may

---

12. City of Akron v. Akron Center for Reproductive Health, Inc., 456 U.S. 988 (1982). Intervenors, allowed as co-defendants in the district court, petitioned unsuccessfully for *certiorari*, but participated as respondents under Supreme Court rules. *See* Seguin v. Akron Center for Reproductive Health, Inc., 456 U.S. 989 (1982).

13. Justice Powell was joined by Chief Justice Burger and Justices Blackmun, Marshall, Stevens, and Brennan. Justice O'Connor dissented, joined by Justices White and Rehnquist. 103 S. Ct. at 2482.

14. *Id.* at 2490.

15. 410 U.S. 113. Justice Powell pointed out that *Roe* had been considered with special care, and that it had been accepted and applied with great consistency in the ten years since its decision. Because of this, he asserted, adherence to stare decisis was especially compelling, thus rejecting the idea that *Roe* should be overturned. 103 S. Ct. at 2487 & n.1.

16. *Id.* at 2491. Justice Powell pointed out, as had the Court in *Roe*, 410 U.S. at 152-53, that the right to privacy was not specifically spelled out within the Constitution. 103 S. Ct. at 2491. Still, among the liberties protected by the fourteenth amendment is the "individual's freedom of personal choice in matters of marriage and family life," and Justice Powell maintained that the *Roe* decision granting the abortion right was "based firmly on that long recognized and essential element of personal liberty." *Id.* While thus establishing the abortion right, *Roe* also held that the right was qualified, the states having legitimate interest in maternal health and in the "potentiality of human life." 410 U.S. at 162-63. As general guidelines for the regulatory effectuation of these interests, *Roe* divided pregnancy into three roughly equal parts (trimesters). In the first trimester the abortion decision is a matter for consideration by the patient and her physician only. *Id.* at 163. During the second trimester (or "that period subsequent to approximately the end of the first trimester" until viability) the state may regulate the abortion procedure in ways which are reasonably related to maternal health. *Id.* at 164. After viability, however, the state may, if it chooses, actually forbid abortion, thus vindicating the acknowledged state interest in the potentiality of human life. *Id.* at 164-65.

The *Roe* Court defined viability as that point in time where the fetus is potentially able to live outside the mother's womb, albeit with artificial aid, and recognized 28 weeks as that point, though acknowledging that viability could occur as early as 24 weeks. *Id.* at 160. For further discussion of the viability issue, *see infra* note 52 & notes 71-73 and accompanying text.

17. 103 S. Ct. at 2492-94.

enact regulations concerning abortions during the first trimester if they have no significant impact on the abortion right,[18] the decisive factor in determining the legitimacy of these regulations rests on a demonstration by the state that the regulations further important health-related concerns.[19] Likewise, the propriety of second trimester regulations depends upon their reasonable relation to maternal health. This, Justice Powell specifically pointed out, precluded any regulation departing from accepted medical practice.[20]

Thus, determination of the validity of an abortion regulation extends beyond recognition that the state has a compelling interest in maternal health or the potentiality of human life. Rather, Justice Powell claimed, the regulation must be reasonably designed to further that interest.[21] And, he added, *Roe v. Wade* did not hold that it is always reasonable for a state to adopt an abortion regulation that applies to the entire trimester.[22]

Noting that the hospitalization requirement of the Akron ordinance[23] presented a significant obstacle for women seeking a second trimester abortion,[24] Justice Powell acknowledged that, at the time of *Roe*, this requirement was in accordance with standard medical practice.[25] Still, he observed, advances in abortion techniques had nullified the safety and health motives for this practice — at least in the early part of the second trimester.[26] Applying the

---

18. *Id.* at 2493.

19. *Id. See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). In *Danforth* the legitimacy of two first trimester abortion regulations was established when the Court found that Missouri had met its burden of demonstrating that the regulations furthered state concerns while not significantly interfering with the woman's exercise of the abortion right. *Id.* at 65-67, 81.

20. 103 S. Ct. at 2493. The "reasonable relationship" test comes from *Roe*, 410 U.S. at 164, but the demand that no regulation depart from accepted medical practice is newly enunciated by Justice Powell, though founded on the Court's decision in *Danforth*. *See* 103 S. Ct. at 2493.

21. 103 S. Ct. at 2495.

22. *Id.*

23. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.03 (1978).

24. 103 S. Ct. at 2495. The Court pointed out testimony mentioned by the appeals court showing that an in-hospital abortion costs more than twice as much as one in a clinic. In addition, there was testimony that second trimester abortions were rarely performed in Akron hospitals. *See* 651 F.2d at 1209. These cost and forced-travel obstacles were viewed as significantly limiting the woman's ability to obtain an abortion. *Id.*

25. 103 S. Ct. at 2495.

26. *Id.* at 2496. At the time of the *Roe* decision the American Public Health Association (APHA) and the American College of Obstetricians and Gynecologists (ACOG) both recommended that post-first trimester abortions be performed in hospitals. By 1980, however, that recommendation was no longer given, as a safe abortion technique not requiring full hospital facilities (dilation and evacuation) could by then be performed through the

review standard for regulation of second trimester abortions as enunciated in *Roe*,[27] Justice Powell asserted that the provision unconstitutionally inhibited the woman's right to an abortion.[28] Although the regulation was found to be appropriate for the later weeks of the second trimester,[29] it was nonetheless invalid, for, according to Justice Powell, if it appears that during a substantial part of the second trimester the state's regulation departs from accepted medical practice, the regulation may not be upheld simply because it may be reasonable for the remaining portion of the trimester.[30]

In affirming the appeals court's invalidation of the parental consent requirement,[31] the Court pointed out that, in *Planned Parenthood of Central Missouri v. Danforth*,[32] blanket requirements for such consent as a condition for an unmarried minor to obtain an abortion were forbidden. The Court observed, however, that in *Bellotti v. Baird*[33] it had indicated that the state has a valid interest in the protection of immature minors, and, toward that end, could institute a "consent substitute" in the form of a procedure whereby the minor is allowed to demonstrate that she is indeed mature or that, in any case, an abortion is in her best interest.[34] The Court maintained that the city had failed to provide for this in its regulation, rejecting the city's argument that such a procedure could and would be carried out in the state juvenile courts.[35]

---

sixteenth week of pregnancy, rather than being confined to the first trimester. *Id.* at 2496 n.25.

27. 410 U.S. at 164.

28. 103 S. Ct. at 2497.

29. *Id.* at 2496. The ACOG standards used by the Court recommended that abortions performed in a physician's office be limited to fourteen weeks of pregnancy—partly extending into the second trimester. *See* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGICAL SERVICES 54 (5th ed. 1982).

30. 103 S. Ct. at 2495. The district and appeals courts had also recognized the advances in abortion safety and had not rejected arguments to the effect that the hospitalization requirement was unreasonable as applied to early second trimester abortions. The lower courts nonetheless upheld the requirement because of an unwillingness to "retreat from the 'bright line' in *Roe v. Wade*." 651 F.2d at 1210. That "bright line" was interpreted by those courts as representing a delineation of when states could begin regulating the abortion process based on their interest in maternal health. This view, the Court maintained, was erroneous. 103 S. Ct. at 2494.

31. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.05 (1978).

32. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976). *See* 103 S. Ct. at 2497.

33. 443 U.S. 622 (1979) (*Bellotti II*).

34. *Id.* at 640-44.

35. 103 S. Ct. at 2498. *Bellotti II* required an opportunity for case-by-case evaluation

With respect to the informed consent provisions,[36] the majority observed that although the state interest in maternal health permitted a requirement that the pregnant woman certify in writing that her consent is informed and freely given,[37] this power to regulate was not unreviewable, and no provision designed to influence choice on the patient's part would be proper.[38] The majority found that Akron had attempted to influence that choice, noting that the information which the physician was to impart was designed to encourage the patient to withhold her consent.[39] The majority further stated that the prescribed list of information to be given the patient represented an intrusion into the discrete operations of the patient's physician, and placed obstacles in the path of the latter, upon whom the woman is entitled to rely for advice.[40] Maintaining that the city had extended its informed consent interest beyond permissible limits,[41] the majority affirmed the lower court's invali-

---

of the maturity of pregnant minors in order for a regulation requiring parental consent to stand. 443 U.S. at 643 n.23. Akron asserted that this evaluation procedure could be conducted, pursuant to section 1870.05(B), in the Ohio Juvenile Court, which court should be allowed the opportunity of construing the "ordinance in a manner consistent with the constitutional requirement of a determination of the minor's ability to make an informed consent." Brief for Petitioners at 28, City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983). The Court, however, disagreed, choosing not to abstain from consideration of the provision's validity. 103 S. Ct. at 2498. Although the Court had abided by the abstention principle in Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*), in the face of a similar statute, the Court maintained that in the instant case there was neither procedure for judicial consideration provided for by the provision, nor evidence that the juvenile court could even exercise the requisite authority. 103 S. Ct. at 2498.

36. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06(B) (1978).

37. 103 S. Ct. at 2499. *See* 428 U.S. at 85. Informed consent provisions in abortion regulations derive their validity from the *Roe*-acknowledged state interest in maternal health. The Court has held that the state may endeavor to insure that the abortion decision has been made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." Colautti v. Franklin, 439 U.S. 379, 394 (1979). In *Danforth*, the informed consent requirement was held to be valid even in the first trimester.

38. 103 S. Ct. at 2500.

39. *Id.* Justice Powell pointed out that section 1870.06(B) included the listing of possible physical and psychological abortion complications—or a "parade of horribles"—"intended to suggest that abortion is a particularly dangerous procedure." *Id.* Similarly, the Justice observed, the provision instructed the physician to inform the potential abortion patient that "the unborn child is a human life from the moment of conception" (a requirement inconsistent with the *Roe* decision forbidding the adoption of a theory of life inception, *see* 410 U.S. at 159-62) and also provided for the anatomical description of the fetus, a requirement which would demand "at best speculation by the physician." 103 S. Ct. at 2500.

40. 103 S. Ct. at 2501. *See* Whalen v. Roe, 429 U.S. 589 (1977).

41. 103 S. Ct. at 2500.

dation of the provision.[42]

The Court, continuing its examination of the informed consent provision, stated that section C of the rule constituted an unreasonable regulation in that it insisted that the physician personally apprise the patient of the abortion procedure and its risks.[43] While acknowledging that the information required was clearly reflective of, and related to, the state interest in maternal health, the Court suggested that the availability of laymen as counselors made the requirement unreasonable as well as potentially more costly.[44] Thus the Court affirmed the lower court's decision that part C was an unconstitutional overextension of the state's informed consent interest.[45]

Affirming the appeals court's holding with regard to the invalidity of the waiting period,[46] Justice Powell stated that the requirement had neither a medical basis nor relevance to any recognized state interest in abortion, and declared that the state cannot require the patient to wait any period of time after consent before proceeding with the abortion.[47]

The Court reiterated the lower courts' rationale with respect to the fetal remains disposal provision.[48] The Court agreed with those courts that the words "humane and sanitary" were unconstitutionally vague.[49]

---

42. *Id.* at 2499.

43. *Id.* at 2503. The district court had declared section 1870.06(C) invalid on dual grounds: on the same basis as did Justice Powell, but also on the grounds upon which it had found part (B) of the section invalid, viz., as interfering with the physician's medical judgment and discretion. 651 F.2d at 1207. This latter contention was declared erroneous by the Court. "Informed consent," Justice Powell maintained, as defined in *Danforth*, meant "the giving of information to the patient as to just what would be done and as to its consequences." 428 U.S. at 67 n.8.

44. 103 S. Ct. at 2502-03.

45. *Id.* at 2503.

46. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.07 (1978).

47. 103 S. Ct. at 2503. The Court refused to accept arguments that the waiting period would be beneficial to the woman as an "opportunity for reflection on the counseling received," *id.*, thus rejecting the notion that either the state interest in maternal health or in informed consent was served. The physician at his discretion, the Court asserted, should be the party deciding whether or not the patient should proceed with the abortion. *See* Colautti v. Franklin, 439 U.S. 379, 387 (1979).

48. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.16 (1978).

49. 103 S. Ct. at 2504. Although the city maintained that the purpose of the provision was to prevent the disposal of aborted fetuses in garbage dumps, the Court maintained that the likelihood that the provision could be construed as requiring a decent burial resulted in a failure to provide the physician with a clear standard of conduct by which to abide. *Id.* Because of this failure (coupled with the presence of criminal penalty for infraction), Justice Powell declared the provision violative of the due process clause. *See* United States v. Har-

Thus the Court sustained the lower courts' invalidation of the regulations concerning parental consent, informed consent, a twenty-four hour waiting period, and fetal remains disposal, while reversing the appeals court's finding that the second trimester hospitalization requirement was valid.[50]

In a dissenting opinion, Justice O'Connor strongly criticized the entire *Roe* trimester framework and maintained that constantly changing abortion techniques and medical technology make the framework incompatible with both sound constitutional theory and the need to decide cases based on the application of neutral principles.[51] Justice O'Connor asserted that the majority opinion itself demonstrated that the trimester approach was an unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in abortion regulation.[52]

Justice O'Connor further maintained that the majority had destroyed the "bright line" which separated permissible and impermissible regulation, thereby doing away with the understanding that the second trimester could be considered as a unit in which the risks posed by all abortion procedures could be considered.[53] Justice O'Connor continued, asserting that just as improved abortion techniques had destroyed the bright line and would continue to move forward the point at which the state could begin regulating in the name of maternal health, so would other medical advances move back the viability point, the point at which the state

---

riss, 347 U.S. 612 (1954).

50. 103 S. Ct. at 2504.

51. *Id.* (O'Connor, J., dissenting). Justice O'Connor was joined by Justices White and Rehnquist.

52. *Id.* at 2505 (O'Connor, J., dissenting). Justice O'Connor maintained that the majority had implicitly abandoned the *Roe* trimester framework when it decided that the standard for regulatory validity should be whether the regulation "departs from accepted medical practice." *Id.* at 2505-06 n.2. This standard, the Justice asserted, was at odds with the "*Roe* view that the relative rates of childbirth and abortion mortality are relevant for determining whether second trimester regulations are reasonably related to maternal health." *Id.* at 2505. *See* 410 U.S. at 150. In *Roe*, the Court found that "abortion in early pregnancy, that is, prior to the end of the first trimester . . . is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Id.* at 149.

53. 103 S. Ct. at 2506 (O'Connor, J., dissenting). Justice O'Connor maintained that both courts and legislatures would encounter problems in dealing with abortion regulation due to the now-blurred lines originally enunciated in *Roe*. Legislative bodies, she asserted, would have to constantly determine whether their statutes would effect a departure from "accepted medical practice", *id.*, while the Supreme Court would have to act as an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Id.* at 2506-07. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 99.

may go so far as to even proscribe abortion.[54] The situation resulting from the impact of this changing medical technology was described by Justice O'Connor as a "collision course."[55]

Justice O'Connor maintained also that the *Roe* framework itself was, in fact, fallacious in theory, because of its erroneous allotment of state interests into trimester periods.[56] State interests in maternal health and potential human life, she argued, are present throughout pregnancy.[57]

Justice O'Connor also observed that in recent cases a standard for validity of second trimester abortion regulations had been enunciated which provided that no such regulation was unconstitutional unless it "unduly burdened" the right to seek an abortion.[58] If the regulation is found to unduly burden the right, she submitted, then strict judicial scrutiny is applied to determine whether a "compelling state interest" is being vindicated.[59] If no undue burden is discerned, then the court's inquiry is limited to whether the regulation bears a rational relationship to a legitimate state purpose.[60] Justice O'Connor asserted that this standard should be ap-

---

54. 103 S. Ct. at 2507 (O'Connor, J., dissenting). The Court in *Roe* recognized viability as occurring at 28 weeks, though acknowledging that it could occur as early as 24 weeks. 410 U.S. at 160. *See supra* note 16. In so doing, as Justice O'Connor proceeded to point out, the Court left the point of viability "flexible for anticipated advancements in medical skill." 103 S. Ct. at 2507. *See also* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 64; Colautti v. Franklin, 439 U.S. at 387. Still, viability was originally calculated in the vicinity of the beginning of the third trimester. Justice O'Connor, however, pointed out that recent studies demonstrate "increasingly earlier fetal viability," and asserted that "it is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future." 103 S. Ct. at 2507.

55. 103 S. Ct. at 2507 (O'Connor, J., dissenting). As well as being a potential victim of rapidly changing medical technology, the dissent claimed that the *Roe* framework "violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles . . ." *Id.*

56. *Id.* at 2508-09 (O'Connor, J., dissenting).

57. *Id.* Justice O'Connor maintained that the states should be able to decide upon the health regulations of its citizens "as long as [such regulations are] within 'the bounds of reason'." *Id.* at 2508. While respecting the *Roe* determination that the state interest in maternal health becomes compelling in the second trimester, Justice O'Connor asserted that the state had an interest even in the first trimester that would merit safety regulation. *Id.* at 2509. Likewise, the dissent maintained that "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward", and, that being the case, Justice O'Connor asserted that the "state's interest in protecting potential human life exists throughout pregnancy." *Id.*

58. *Id.* at 2509 & n.8 (O'Connor, J., dissenting). *See* Maher v. Roe, 432 U.S. 464, 473-74 (1977). *See also* Harris v. McRae, 448 U.S. 297, 314 (1980); Bellotti v. Baird (*Bellotti I*), 428 U.S. 132, 147 (1976); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 81 (1976).

59. 103 S. Ct. at 2510 (O'Connor, J., dissenting).

60. *Id.* Justice O'Connor maintained that this "unduly burdensome" standard was ap-

plied in the determination of a regulation's validity throughout the entire pregnancy, without reference to the trimester involved.[61]

Applying this standard to the provision of the Akron ordinance, Justice O'Connor advocated the validity of the hospitalization requirement,[62] the informed consent provision,[63] and the waiting-period rule.[64] With regard to the parental consent provision, Justice O'Connor stated that the wiser decision would have been to abstain and afford the courts an opportunity to construe it consistently with the *Bellotti* requirements.[65] She likewise rejected the majority's contention that the fetal remains disposal provision was unconstitutionally vague.[66] Justice O'Connor, in the application of the undue burden test, was thus at odds with each of the findings of the majority: she was unwilling to characterize any of the Akron provisions as "unduly burdensome."

The Court's invalidation of the Akron ordinance was predictable in light of its accompanying reaffirmation of *Roe v. Wade*. *Roe* established abortion as a fundamental right, and few regulations upon it were likely to survive the strict scrutiny which the Court undertook in *Akron*.[67] That the Court felt it necessary to make

---

propriate in the realm of determining the validity of abortion regulations by virtue of the limited nature of the abortion right. *Id.* at 2510 & n.10. Justice O'Connor asserted that "not every regulation that the state imposes must be measured against the state's compelling interests and examined with strict scrutiny," *id.* at 2509, stating further that this approach (the two-step undue burden test) "is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context." *Id.* at 2510. Justice O'Connor, citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37 (1973), maintained that strict scrutiny is only applied when a fundamental right has been "deprived, infringed, [or] interfered [with]." Indeed, prior cases striking down state regulations for the most part included "situations involving absolute obstacles or severe limitations on the abortion decision." *Id.* at 2511.

61. 103 S. Ct. at 2511 (O'Connor, J., dissenting).

62. *Id.* at 2512 (O'Connor, J., dissenting).

63. *Id.* at 2514-15 (O'Connor, J., dissenting).

64. *Id.* at 2515-16 (O'Connor, J., dissenting).

65. *Id.* at 2513 (O'Connor, J., dissenting).

66. *Id.* at 2516 (O'Connor J., dissenting).

67. Because the due process-compelling state interest standard applied in *Akron* is so strict, regulations designed principally to hinder abortion—such as part (B) of the informed consent provision—or to promote reflection upon the decision—such as the 24-hour waiting period—had little chance of being sustained, due to their lack of relation to a compelling state interest. The parental consent and fetal remains disposal provisions, on the other hand, failed mainly because of poor draftsmanship; more exacting language would have made these provisions survive. *See generally* P. CUNNINGHAM, T. MARZEN, & M. QUINLAN, WHERE ARE WE NOW: THE SUPREME COURT DECISIONS TEN YEARS AFTER ROE V. WADE 8-13 (Studies in Law and Medicine No. 17, 1983). For further discussion of the *Roe* standard, *see infra* notes 86-95 and accompanying text. For discussion of the Court's invalidation of the hospitalization requirement, *see infra* notes 95-111 and accompanying text.

such a strong reassertion is, however, indicative of the problems which have developed since *Roe*, given changing medical technology and the inconsistent treatment of *Roe* and its progeny.

The origin of the trimester framework is found in the *Roe* Court's determination that it is only after the first three months of pregnancy that abortion entails a greater risk of maternal mortality than does childbirth.[68] A compelling state interest in maternal health could be discerned in this period, and states may regulate in a manner reasonably related to that interest, as long as the statute is narrowly drawn.[69] Lower courts, however, were thereafter presented with evidence that medical advances were extending forward in time the point at which abortion was less dangerous to the mother than childbirth.[70] This led some courts to accelerate the vesting point where abortion was again more dangerous.[71] Other courts, in the face of similar evidence, maintained that *Roe* had established a strict chronological division of regulation, rejecting the idea that courts should be burdened with constant examination of medical technology.[72]

The issue thus became one of the flexibility of the trimester framework.[73] *Roe* made it clear that the state may prohibit abortion completely at the point of viability[74] (which at that time hap-

---

68. 410 U.S. at 163.

69. *Id.* at 155, 163-64. This is the test prescribed for the examination of regulations affecting fundamental rights in the substantive due process field. *Id.* at 155. *See also infra* note 92.

70. *See, e.g.*, Planned Parenthood of Kansas City, Mo. Inc., v. Ashcroft, 664 F.2d 687, 690 n.6 (8th Cir. 1981) (citing statistics showing that because of D&E procedure, abortion is safer than childbirth through 17th or 18th week of pregnancy). *See also* Cates & Tietze, *Standardized Mortality Rates Associated with Legal Abortion: United States, 1972-1975*, 10 FAM. PLAN. PERSP. 109, 112 (1978) (abortion safer than childbirth until 16th week). The *Akron* Court noted that the "death-to-case" ratio for second trimester abortions overall in the U.S. fell from 14.4 deaths per 100,000 abortions in 1972 to 7.6 per 100,000 in 1977. 103 S. Ct. at 2496 n.22. For further discussion of this latter statistic, *see* Benedict, *Second Trimester Abortion in the United States*, 11 FAM. PLAN. PERSP. 358 (1979), and Noonan, *The Akron Case*, 3 HUMAN LIFE REV. 4, 7 (1983).

71. *See* Margaret S. v. Edwards, 488 F. Supp. 181, 194-96 (E.D. La. 1980) (abortion regulation invalid on grounds that it attempted to regulate abortion before 18th week, during which time abortion was safer than pregnancy); and Wolfe v. Stumbo, 519 F. Supp 22, 23, 25 (W.D. Ky. 1980) (hospitalization requirement declared invalid after finding the D&E abortion was safer than childbirth up to 29th week) (citing *Margaret S.* with approval).

72. *See, e.g.*, Gary-Northwest Ind. Women's Services, Inc. v. Bowen, 496 F. Supp. 894, 899 (N.D. Ind. 1980) (Supreme Court in *Roe* "force[d]" states to use end of first trimester as cutoff point for regulation), *aff'd sub. nom.*, Gary-Northwest Ind. Women's Services, Inc., v. Orr, 451 U.S. 934 (1981).

73. *See* Note, *Hospitalization. Requirements for Second Trimester Abortions: For the Purposes of Health or Hindrance?* 71 GEO. L.J. 991, 996 & n.23 (1983).

74. 410 U.S. at 164.

pened to be at the commencement of the third trimester) and thus, with regard to the last trimester, the framework is flexible and able to accommodate medical advances which change the viability point.[75] In relation to the second trimester, the issue was manifested most notably in medically-based regulations—such as Akron's—which required hospitalization for all post-first trimester abortions. In invalidating the Akron regulation, the Court has sought to retain the trimester system by requiring specifically that states make a reasonable effort to limit the effect of their regulations to the period *within* the trimester during which their health interest will be furthered.[76] By defining reasonableness on the basis of what is "accepted medical practice,"[77] however, the Court has not only insisted on narrowness of draftsmanship, but has, as the dissent noted,[78] abandoned the governing criteria on which the second trimester was originally constructed—the relative rates of childbirth and abortion mortality.[79] In this regard, although the Court purported to retain the trimester framework, the framework has in fact been clearly modified.

While the Court dealt with the effect of medical advances which work to move forward one end of the trimester framework, it totally ignored Justice O'Connor's comments concerning the effects

---

75. That this has been the interpretation of *Roe* is reflected by the prohibition of states to define with preciseness the point at which the fetus becomes viable. *See* Colautti v. Franklin, 439 U.S. 379, 388-89 (1979) (holding that neither courts nor legislatures may define an element involved in the determination of viability). Viability is permissibly defined in statutes as that point "when, in the judgment of the attending physician on the particular facts of the case before him, there is reasonable likelihood of the fetus' sustained survival outside the womb." *Id.*

76. 103 S. Ct. at 2495.

77. *Id.* at 2492 n.11, 2493, & 2497.

78. *Id.* at 2505 n.2 (O'Connor, J., dissenting).

79. While Justice Powell took note of the fact that the point at which abortion is safer than childbirth has been moved forward into the second trimester, *id.* at 2492 n.11, the Court was most impressed with the parallel statistics provided by medical organizations that the D&E procedure was safe and approved through the 18th week of pregnancy, and that there was no need or recommendation for hospital facilities for the operation. *Id.* at 2496 & n.25. The advice provided by the medical groups that it is acceptable medically to perform abortions outside the hospital—and *not* the coincidental fact that abortion is now safer than childbirth—formed the basis of the Court's decision. Justice Powell in this regard thus commented that "[t]he comparison between abortion and childbirth mortality rates may be relevant *only where* the state employs a health rationale as a justification for a complete prohibition on abortions in certain circumstances." *Id.* at 2492 n.11 (emphasis added). By so holding, the Court not only abandoned the *Roe* framework's original governing criteria but established as the "keystone of the opinion . . . the majority's apparently unwavering and unshaken belief in the integrity and high standards of the medical profession . . . ." CUNNINGHAM & QUINLAN, *supra* note 67, at 2.

of advances which place viability closer to conception.[80] This non-observance was necessary in order to affect the Court's reaffirmation of *Roe,* for by ignoring such advances, the problem of what to do when the two points meet could be avoided. Such a meeting, which, as the dissent pointed out, is inevitable,[81] would be a death knell for the trimester framework, for a regulatory guideline which would both forbid state interference in the abortion decision and allow its total prohibition is of no use.[82]

Irrespective of the Court's refusal to deal with the *Roe* framework's future utility, a present effect of the *Akron* court's modification is to do away with the notion that the trimester framework established a "bright line" which defined the point at which the state may freely regulate.[83] Nor would it be accurate to say that there now exists a "bright line" which moves in accordance with the statistical defining of relative maternal mortality rates between abortion and childbirth, because that tenet of *Roe* has been abandoned.[84] Rather, as the dissent pointed out, legislatures and courts must now become diligent and conscientious students of medical and scientific literature to determine the substance of currently "accepted medical practice."[85]

In reaffirming the *Roe* trimester framework, the Court undertook also to redefine and apply the standard of review proper for second trimester regulation.[86] A principal result of *Akron* in this regard, is its implicit rejection of a method of abortion regulation review utilized by many courts since *Roe.* As discussed above, *Roe* demanded that regulations in this period be reflective of a compelling state interest, reasonably related to that interest, and narrowly drafted.

---

80. 103 S. Ct. at 2507 (O'Connor, J., dissenting).

81. *Id.*

82. Theoretically, this situation would occur, given *Akron's* new criteria, when it becomes accepted medical practice to perform a D&E—or any other kind of abortion—at 22 weeks, while at the same time it has become generally recognized that the fetus can survive outside the womb at the same point. This would create the nonsensical situation where the state could totally prohibit something (abortion) that would have become accepted medical practice to perform, and thus free from regulation. This is the scenario the dissent would characterize as the outcome of the "collision course." *Id.* at 2507 (O'Connor, J., dissenting).

83. For examples of the prior adherence to the "bright line" notion, *see* Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1210 (6th Cir. 1981) (court declined to retreat from "bright line" established by *Roe*), and Gary-Northwest Indiana Women's Services v. Bowen, 496 F. Supp. 894, 900 (N.D. Ind. 1980) (court demanded respect for regulatory line drawn in *Roe*).

84. *See supra* notes 77-79 and accompanying text.

85. 103 S. Ct. at 2506 (O'Connor, J., dissenting). *See also* CUNNINGHAM & QUINLAN, *supra* note 67, at 9-10.

86. 103 S. Ct. at 2490-93.

In three later abortion cases, however, *Bellotti v. Baird*,[87] *Maher v. Roe*,[88] and *Planned Parenthood of Central Missouri v. Danforth*,[89] the Court produced language that was interpreted by many lower courts as suggesting that a "threshold burden" must be reached before the exacting standard of "strict scrutiny" of the compelling state interest test is applied to a regulation.[90] On the same basis, other courts have applied a similar test, maintaining that a regulation must place a "legally significant burden" on the abortion decision before the strict scrutiny of the compelling state interest test is applied.[91] These formulations constitute a less demanding standard of review than the strict scrutiny originally enunciated in *Roe*,[92] and would allow greater latitude in state regulation of abortion.[93]

---

87. 428 U.S. 132 (1976) (*Bellotti I*).

88. 432 U.S. 464 (1977).

89. 428 U.S. 52 (1976).

90. *See* Danforth, 428 U.S. at 79-81 (abortion record-keeping requirement did not "unduly burden" abortion right); *Maher*, 432 U.S. at 473-74 (*Roe* right protects woman from "unduly burdensome" interference); *Bellotti I*, 428 U.S. at 147 (quoting *Danforth* with approval, abortion regulation not unconstitutional "unless it unduly burdens the right to seek an abortion"). For lower court cases in which the "undue burden" test was applied, *see* Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848, 857 (8th Cir. 1981) (direct burden on abortion right required before compelling state interest standard is triggered), *aff'd after remand*, 664 F.2d 687 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 2267 (1982), *rev'd*, 103. S. Ct. 2517 (1983) (Court, consistently with *Akron* decision, rejecting test of appeals court); and Christensen v. Wisconsin Medical Bd., 551 F. Supp. 565, 568 (W.D. Wis. 1982) (regulation found as a "threshold matter" to burden fundamental right).

91. *See, e.g.*, American College of Obstetricians and Gynecologists v. Thornburgh, 552 F. Supp. 791, 796 (E.D. Pa. 1982) (compelling state interest test only applies after legally significant burden is found). *See also* Note, *Kentucky's New Abortion Law: Searching for the Outer Limits of Permissible Regulation*, 71 KY. L.J. 617, 623-24 (1983).

92. The *Roe* test and the one which subsequently developed are those used by the Court in its examination of regulations impinging on fundamental rights. *See, Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1193-97 (1980). The compelling state interest standard (defined in *Roe*) is the approach used in dealing with substantive due process issues. *See* Zablocki v. Redhail, 434 U.S. 374, 396 (1978) (Stewart, J., concurring), and Griswold v. Connecticut, 381 U.S. 479, 481 (1965). What the dissent in *Akron* characterized as the "undue burden" test with its two-step analysis, on the other hand, is the standard applied when questions of equal protection are at issue. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (two-step "burden" analysis "still holds sway as the Court's articulated description of the equal protection test").

93. *See* CUNNINGHAM & QUINLAN, *supra* note 67, at 7. Under the *Roe* standard, the imposition of any regulation having more than a *de minimis* effect results in the state having to show a compelling interest. Under the "threshold" formulations, however, the plaintiff must first demonstrate an "undue burden" and then conceivably rebut reasons offered by the state for the interference. Only upon a successful showing of what the judge considers an "undue burden" will strict scrutiny apply. *See* Charles v. Carey, 627 F.2d 772, 778 (7th Cir. 1980). In *Carey*, this approach was characterized as little more than a rational-relation

Controversy thus developed as to whether the Court was establishing a threshold requirement for strict scrutiny in its decisions, or whether it was simply characterizing what was necessary to invalidate a regulation encroaching upon a fundamental right by way of the compelling interest test.[94] The *Akron* Court finally disposed of the controversy in its clear reassertion of the *Roe* compelling state interest test. The reaffirmation of this standard and the implicit rejection of the less onerous two-step, "rigid tier" approach is a demonstration of the *Akron* Court's conviction that the right to obtain a second trimester abortion is no less fundamental than the general right to obtain an abortion acknowledged in *Roe*. In *Akron*, the Court has clarified the standard for the lower courts, and the decision serves—at least temporarily—as an indication of the level of inspection to which legislatures may expect their abortion regulations to be subject.[95]

In contrast to most of the other Akron ordinance provisions, which were predictably invalidated due to the Court's application of strict scrutiny, the hospitalization requirement was of a type generally thought to be legitimate. Both modification of the *Roe* framework and clarification of the standard of review were in-

---

test under which strict scrutiny would be virtually precluded. *Id.* at 777-78. Thus abortion regulations under the "undue burden" test have a much greater chance of survival than under the compelling state interest standard.

94. For the proposition that *Maher* and *Danforth* sought to establish a threshold requirement, *see* Brief for the United States as Amicus Curiae in Support of Petitioners, City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); for the contention that the cases were merely referring to the ultimate constitutional issue, *see* Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980). The dissent in *Akron* adopted the former view, and cited *Maher* and *Danforth* as instances in which this threshold requirement was applied. *See* 103 S. Ct. at 2505 and 2509 n.8 (O'Connor, J., dissenting). The dissent's reliance on these cases, however, was improper because of the different context in which the "undue burden" language was being used. *Maher* dealt with a law restricting the use of state funds for abortion, rather than with a statute designed to discourage or limit the practice. *See* 432 U.S. at 467. The challenge in *Maher* alleged that the state, by funding childbirth while denying payments for abortions, was both burdening the abortion decision and denying equal protection of the law. *Id.* The issue in *Maher* was thus different than in *Roe* and *Akron*, and the Court validated the statute after applying the two-step test used in equal protection analysis, and not the compelling state interest test applicable to substantive due process issues. *See Developments, supra* note 92, at 194 & n.244. *Danforth*, similarly, cannot be relied on for the proposition that the Court adopted a two-step "undue burden" standard. The Court in *Danforth* allowed a record-keeping requirement to stand by characterizing it as having "no significant impact" on the abortion decision. In so ruling, the Court was not suggesting that the threshold had not been reached in the process of a two-step analysis, but that, in the balance of interests involved in strict scrutiny, the state interest was strong enough—and the effect on the abortion right negligible enough—to justify the regulation. *See* Note, *supra* note 73, at 1109 n.100.

95. *See generally,* CUNNINGHAM & QUINLAN, *supra* note 67 at 8-13.

volved in the invalidation of this commonly encountered regulation.[96]

Regulations demanding that all second trimester abortions be performed in hospitals were very common at the time of the *Akron* decision.[97] Such regulations were specifically mentioned in *Roe* as the type of second trimester regulation that would be permissible.[98] *Doe v. Bolton*,[99] the case immediately following *Roe*, struck down a requirement demanding both that abortion-providing hospitals be accredited and that all abortions, regardless of the trimester involved, be performed in a hospital.[100] The rationale for the invalidation with regard to hospitalization was that it did not exclude first trimester abortions, but the Court stated, that even had it excluded such abortions the statute would have been invalid because of the state's failure to prove that only hospitals could vindicate the state interest in protecting maternal health.[101]

While *Doe* thus refined the *Roe* statement concerning hospitalization requirements by suggesting that not every such regulation was per se legitimate,[102] hospitalization requirements were nevertheless upheld automatically by some courts on a per se basis.[103] Other courts upheld the requirement after applying the "undue burden" test, one court finding, for example, that the great availability of hospitals to perform the abortion demonstrated that the requirement was not unduly burdensome.[104]

As advances in abortion techniques made it evident that the hospitalization requirement could not be shown to relate reasonably to a valid health interest, courts willing to bend the trimester frame-

---

96. In January, 1983, twelve states, the Virgin Islands, and the City of Akron had laws requiring that all second trimester abortions be performed in hospitals. *See* Note, *supra* note 73, at 992 & n.14. In addition, the Supreme Court had given summary affirmance to a statute with this requirement. *See infra* note 106 and accompanying text.

97. For examples of these regulations, *see* N.Y. ADMIN. CODE tit. 10, § 405.17(a) (1977); Abortion Control Act, No. 1982-138 Section 1, 1982 Pa. Legis. Serv. 750, 765-66 (Purdon); TENN. CODE ANN. § 39-301(e)(2) (1975).

98. 410 U.S. at 163.

99. 410 U.S. 179 (1973).

100. *Id.* at 195.

101. *Id.*

102. *See* Note, *supra* note 73, at 1000.

103. *See* Gary-Northwest Ind. Women's Services, Inc. v. Bowen, 496 F. Supp. 894, 899 (N.D. Ind. 1980) (second trimester hospitalization requirement per se constitutional); Wynn v. Scott, 449 F. Supp. 1302, 1318 (N.D. Ill. 1978) (*Roe* specifically permits post-first trimester hospitalization requirements).

104. American College of Obstetricians v. Thornburgh, 552 F. Supp. 791, 804 (E.D. Pa. 1982).

work declared such provisions unconstitutional.[105] Still, the Supreme Court in 1981 summarily affirmed a district court ruling which declared the Indiana second trimester requirement constitutional.[106]

Despite this summary affirmance of the Indiana regulation, varied treatment of hospitalization requirements continued. The appeals court in *Akron*, for instance, sustained the requirement only because it was unwilling to retreat from the "bright line" it perceived was established in *Roe*.[107] The appeals court in the companion case to *Akron, Planned Parenthood v. Ashcroft*,[108] meanwhile, found the Kentucky requirement unconstitutional after applying the undue burden test.[109]

The issue has apparently been resolved by the Court in its invalidation of the Akron ordinance. Blanket requirements that all second trimester abortions be performed in hospitals will not withstand challenge,[110] though more narrowly drawn regulations should survive.[111]

Because it is tied to changing medical technology, abortion regulation is likely to be the subject of further Supreme Court decisions. Because *Akron* more securely tied the validity of abortion regulations to current medical practice in its modification of the trimester framework, courts must continue to analyze the state in-

---

105. *See supra* note 7 and accompanying text.

106. Gary-Northwest Ind. Women's Services, Inc. v. Orr, 451 U.S. 934 (1981). The *Akron* Court claimed that this summary affirmance was not binding precedent on it because the decision was partly based on the failure of the plaintiffs to prove the unreasonableness of requiring that early second trimester abortions be performed in hospitals, and not exclusively on the grounds that hospitalization requirements were per se legitimate. 103 S. Ct. at 2494 n.18. This rationale probably need not have been invoked to invalidate the statute, however, as the precedential value of summary affirmances is limited. *See* Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

107. City of Akron, 651 F.2d at 1210. *See* 103 S. Ct. at 2494.

108. 103 S. Ct. 2517 (1983).

109. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 664 F.2d 687 (8th Cir. 1981) (*Ashcroft III*).

110. The new prohibition of such regulations was immediately applied in Simopoulos v. Virginia, 103 S. Ct. 2532, 2534 (1983). Although Virginia required that all second trimester abortions be performed in a hospital, the provision survived because licensed outpatient clinics fell within the statutory definition of "hospital". *Id.*

111. *See* Note, *supra* note 73, at 1019-21. Because *Akron* demands that no requirement depart from accepted medical practice, hospitalization requirements, to be valid, must accurately reflect what the current medical standards and practices are. In light of frequent changes in medical techniques, it may be that laws such as Nebraska's, which outlaw the performing of an abortion "by using anything other than accepted medical procedures, . . ." are the only ones which are safe from constitutional invalidation. *See* NEB. REV. STAT. § 28-336 (1979).

terest in maternal health on a case-by-case basis. Prior decisions, therefore, will be of only limited importance because of their possible reliance on outdated medical data.

The enduring value of *Akron* and its clear affirmation of *Roe* is, in fact, threatened by changing medical technology. If, as the dissent maintained, viability in the near future may occur in the first trimester,[112] the *Roe* framework will be of little practical use as a legislative guideline. Another threat to the efficacy of the *Akron* decision is the apparent resolve of the dissent that access to second trimester abortions—or to any abortion, for that matter—is less than a fundamental right, legislation concerning which is subject only to a simple rational-relationship analysis.[113] While this approach was clearly latent at the time of the *Akron* decision, a change in the composition of the Supreme Court may, in fact, activate this approach, and remove the fundamental underpinnings of the *Roe* and *Akron* opinions.

David B. Torrey

112. 103 S. Ct. at 2507 (O'Connor, J., dissenting). *See supra* notes 80-82 and accompanying text.

113. 103 S. Ct. at 2511 n.10 (O'Connor, J., dissenting). The dissent made it clear that the unduly burdensome standard was appropriate "*not* because it incorporates deference to legislative judgment at the threshold stage of analysis, but rather because of the limited *nature* of the fundamental right that has been recognized in the abortion cases." *Id.* (emphasis in original).